

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MATTHEW F. AND VIRGINIA M. FORD	:	DETERMINATION
	:	DTA NO. 814725
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1977 through 1985.	:	

Petitioners, Matthew F. Ford and Virginia M. Ford, 2950 W. 1100 N Lot # 12, Decatur, Indiana 46733-8718, filed a petition for refund of personal income tax under Article 22 of the Tax Law for the years 1977 through 1985.

The Division of Taxation brought a motion for summary determination pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners' time to respond to the motion expired on August 19, 1996 which date began the ninety-day period for issuance of this determination. Petitioner Matthew F. Ford appeared pro se and on behalf of Virginia M. Ford. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel). After due consideration of the pleadings and motion papers, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners are entitled to refunds of personal income taxes paid for the years 1977 through 1985.

FINDINGS OF FACT

1. Petitioners, Matthew F. Ford and Virginia M. Ford, filed a petition seeking a refund of New York State personal taxes paid for theyears 1977 through 1985. The only issue raised by the petition is whether petitioner filed a timely claim for refund of the taxes paid for those years.

2. According to the affidavit of Charles Bellamy, an employee of the Division whose duties include the processing of refund claims, petitioners timely filed New York State personal income tax returns for the years in issue. Mr. Bellamy states that the returns were filed on or before April 15 of the year following the year of the return, i.e., their 1977 personal income tax return was filed on or before April 15, 1978, their 1978 personal income tax return was filed on or before April 15, 1979, etc.

3. Mr. Bellamy also states that petitioners filed claims for refund for the years 1977 through 1985 in October 1989. According to Mr. Bellamy, petitioners did not file refund claims or amended tax returns for those years before October 1989.

4. The basis for petitioners' refund claims is the United States Supreme Court decision in Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891) which invalidated a Michigan statute exempting State pensions from tax but not Federal pensions. The Court decided the Davis case on March 28, 1989. Shortly thereafter, many Federal pensioners, like Mr. Ford, filed claims for refund of New York State income taxes paid on income from Federal pensions. At first, New York State took the position that the Davis decision did not apply retroactively to tax years before the Davis decision was issued (see, Duffy v. Wetzler, 148 Misc 2d 459, 555 NYS2d 543, affd as mod, 174 AD2d 253, 579 NYS2d 684, appeal dismissed 79 NY2d 976, 583 NYS2d 190, appeal dismissed 80 NY2d 890, revd 509 US 917, 125 L Ed 2d 74). In a second ruling, the Supreme Court held that the Davis decision must be applied retroactively. However, the Court did not order the payment of refunds to Federal pensioners; instead, it held that whether a refund was due in any specific instance was a matter of state law (Harper v. Virginia Dept. of Taxation, 509 US 86, 125 L Ed 2d 74). In June 1994, New York began processing the refund claims of Federal pensioners and making payments to all taxpayers who satisfied the criteria of New York State law: (1) they had paid New York State personal income tax on Federal pension income, and (2) they had filed refund claims in a timely fashion.

5. On or about June 28, 1994, the Division issued a letter to petitioners under the signature of James W. Wetzler, Commissioner of Taxation and Finance. In that letter, Commissioner Wetzler stated that the State had decided to approve refund claims rather than wait for further judicial action. He explained that in petitioners' case it was not possible for the Division to determine the exact amount of refund which might be due. Petitioners were asked to provide the Division with copies of Form W-2P, showing their original Federal pension income, and copies of their Federal and State tax returns for the years for which refunds were sought.

6. The Division issued a refund check to petitioners for the year 1986 and, on or about October 24, 1994, issued them a Notice of Disallowance of their refund claims for the years 1977 through 1985. As pertinent, that notice states:

"Unfortunately, the refund claim(s) you have filed cannot be paid . . . because . . . the claim(s) was not timely filed.

"Under New York State Law (Tax Law section 687), refund claims for any overpayment of tax must be filed by the taxpayer within three years from the date the return was filed or two years from the date the tax was paid, whichever of such periods expires the later. As this three-year limitation on refund claims is statutory (a matter of law), only a change in the law would permit this Department to pay refund claims filed after the three-year limitation has expired."

7. The Division issued a Conciliation Order to petitioners, dated December 22, 1995, sustaining the Division's Notice of Disallowance.

8. Commissioner Wetzler's letter led petitioners to believe that their refund claims had been approved and that they only needed to provide the information requested in that letter. Since petitioners provided the information within two to three weeks of receiving Commissioner Wetzler's letter, petitioners believe that they are entitled to receive refunds of tax. Petitioners argue that the period of limitation on refund claims should not apply in this instance because the law exempting state pensions but not Federal pensions from taxation was later found to be unconstitutional. In their view, the Division has superseded the authority of the Supreme Court.

CONCLUSIONS OF LAW

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums at Stony Brook v. Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (see, Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881).

There are no facts in dispute in this proceeding. Inasmuch as petitioner did not respond to the Division's motion or challenge the facts asserted in the Bellamy affidavit, those facts may be deemed to be conceded (see, Kuehne & Nagel v. Baiden, 36 NY2d 539, 544, 369 NYS2d 667). The Bellamy affidavit establishes that petitioner filed a claim for refund of taxes in October 1989, more than three years from the filing of petitioners' tax returns for the years 1977 through 1985. Inasmuch as there are no material and triable issues of fact presented, a determination may be issued, as a matter of law, in favor of any party.

B. Tax Law § 687(a) states, as relevant:

"Claim for credit or refund of an overpayment of income tax shall be filed . . . within three years from the time the return was filed or two years from the time the tax was paid . . . or, if no return was filed, within two years from the time the tax was paid."

There is no basis in statute or case law for extending the three-year period because a tax has been paid pursuant to a taxing statute later found to be unconstitutional.

When petitioners filed their personal income tax returns for the years in issue, New York State's Tax Law required taxpayers to include Federal pension payments in their calculation of New York State taxable income. Tax Law § 612(c)(former [3]) allowed State pensioners to

exclude their pension income from the calculation of New York adjusted gross income, but there was no equivalent provision that allowed Federal pensioners to exclude their pension payments from tax. At that time, approximately 24 states had tax or pension statutes which exempted state pensions but not Federal pensions from income tax (see, Duffy v. Wetzler, supra). In effect, these statutes were invalidated by the Davis decision. Following that decision, the New York State Legislature amended Tax Law § 612(c)(3). As amended, the new provision excludes Federal pensions from New York's personal income tax; however, the amendment applies only to Federal pensions received in taxable years beginning on or after January 1, 1989 (L 1989, ch 664, §§ 1, 2, effective July 21, 1989).

Here, the Division denied petitioners' refund claims on the sole ground that they were not filed within the three-year period of limitation of section 687(a) of the Tax Law. The question raised by petitioners is whether the Division may enforce the three-year period of limitation for filing refund claims where the tax was paid pursuant to a taxing statute later found to be unconstitutional. Based on United States Supreme Court precedent, I find that the Division correctly enforced the three-year limitation period.

The Supreme Court has held that the states are required to afford taxpayers a meaningful opportunity to secure relief for taxes paid under a statute that is later found to be unconstitutional (see, McKesson v. Division of Alcoholic Beverages (496 US 18, 110 L Ed 2d 17, 27). At the same time, the Supreme Court has recognized a state's "exceedingly strong interest in financial stability" (McKesson v. Division of Alcoholic Beverages, supra at 37, 110 L Ed 2d at 36). The ultimate question in such a case is whether the taxpayer is provided with "meaningful backward-looking relief to rectify any unconstitutional deprivation" (Harper v. Virginia, supra at 98, 125 L Ed 2d at 89, quoting McKesson v. Division of Alcoholic Beverages, supra at 31, 110 L Ed 2d at 32). New York's refund procedure provides such relief.

New York provides a clear and certain post-payment remedy to any taxpayer who believes that taxes imposed by the State violate the United States Constitution. A taxpayer may file a claim for refund of an overpayment of tax within three years from the time the return was

filed or two years from the time the tax was paid (Tax Law § 687[a]). A taxpayer may seek a review of a refund denial by filing a petition with the Division of Tax Appeals (Tax Law §§ 689, 2008). These provisions provide taxpayers with a meaningful opportunity to obtain relief pursuant to a tax scheme later found to be unconstitutional, and they satisfy the requirements of due process as outlined by the United States Supreme Court (see, Reich v. Collins, 513 US __, 130 L Ed 2d 454; Harper v. Virginia, supra; McKesson v. Division of Alcoholic Beverages, supra).

C. If petitioners believed that Tax Law § 612(c)(former [3]) was constitutionally invalid, they might have protected their interests by paying the tax under protest or filing a claim for refund within the statute of limitations. By not notifying the Division of their disagreement with the tax statute until October 1989, petitioners relinquished their entitlement to refunds for years prior to 1986 (see, Matter of Fiduciary Trust Co. v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119).

D. The motion of the Division of Taxation for summary determination in its favor is granted, and the petition of Matthew F. Ford and Virginia M. Ford is denied.

DATED: Troy, New York
October 17, 1996

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE